BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Specifications of Error

1. The Circuit Court of Appeals erred in reversing the decision of the district court.

2. The Circuit Court of Appeals erred in not holding that the failure of the indictment to inform the petitioners of the accusation against them with reasonable particularity as to time, place and circumstance violated the provisions of the Fifth and Sixth Amendments to the Constitution of the United States.

3. The Circuit Court of Appeals erred in holding that the omission from the indictment of these constitutional requirements can be "remedied" by an application to the district court for a bill of particulars.

4. The Circuit Court of Appeals erred in not holding that the attempt to assert jurisdiction and venue in the District of Kansas denied to the petitioners their right under Article 3, Section 2, Paragraph 3, and under Amendment Sixth of the Constitution to be tried only "in the state and district wherein the crime shall have been committed."

Analysis of Indictment

In the petition for certiorari, we assert that the indictment contains no information which will enable the defendants to prepare a defense. In the event of trial and judgment thereunder, defendants would be unable to plead an acquittal or conviction in bar of any other proceeding against them, based on the same matters for which they were acquitted or convicted in this indictment, because no specific time, place or subject matter are described. In view of the *length* of the indictment, the court may at first blush think the statement that defendants are merely charged with an unlawful conspiracy under the anti-trust laws, in the very words of the statute, without particularization as to time, place and circumstance, is an overstatement of the case. Careful analysis of the indictment demonstrates that we have correctly stated the case, and that the prolixity of language used in drafting the indictment is either descriptive of the grocery business or of the defendants' history, and has nothing to do with the gist of the charge. Most of the indictment is either surplusage or the pleading of general conclusions without any particularization as to the time, place or circumstances involved.

Count One of the indictment charges restraint of trade. Count Two, monopoly. Otherwise the two counts are substantially the same. Hence this analysis, confined to Count One, applies equally to Count Two.

The indictment begins in Section I by stating that it refers to an unknown time beginning on or about January 1, 1917 and continuing to date. This covers a period preceding our entry into World War I and stretches through the administrations of Presidents Wilson, Harding, Coolidge, Hoover and Roosevelt. Who can come into a courtroom prepared to defend every act over practically his entire life?

Section II is devoted to dictionary definitions of words, but food is nowhere described, except that it includes food for humans and "for livestock and poultry."

Section III names the defendants, tells who they are and where they live. All of the individual defendants live in Cincinnati, Ohio. The corporate defendants are incorporated in Ohio, have their principal place of business in Cincinnati, Ohio, where, the indictment says, "their principal officers remain and where their principal records are kept." It also alleges that the individual defendants control all the business, policies and practices of the corporate defendants from Cincinnati, Ohio.

Section IV sets forth voluminously a general description of portions of the grocery business and some census figures, showing that in 1939, 387,337 grocery stores had sales of $7,721,753,000, which represented only *70%* of the sales in stores in the United States, and that Kroger sales for the same period were only $243,356,605 and the number of Kroger stores was approximately 3,422 (a fraction of 1% of the total sales and number of stores). The same section describes the acquisition of stores by the Kroger Company beginning in 1902 and continuing to 1939. It also describes the Kroger organization, its divisions and some of the numerous products manufactured, processed, canned, packed, bought, jobbed and sold by Kroger. This description has nothing to do with the alleged combination and conspiracy, and covers fifteen paragraphs and nine pages (R. 6 to 15).

The charging part of Count One is contained in Section V, paragraph 19, which charges, *in the language of the statute*, that for "many years" prior to the indictment, "defendants formed a wrongful and unlawful combination and conspiracy to unduly, unreasonably and directly restrain interstate trade and commerce in food and food products produced, distributed and sold in many states of

the United States, in violation of Section I of the Act of Congress of July 2, 1890."

The above quoted paragraph tells the defendants nothing more than the language of the Sherman Act.

Paragraph 20 then sets forth what are called "substantial *terms*" of the conspiracy. It cannot be contended that these "terms" inform defendants of any alleged "acts" so that they can properly defend themselves. The indictment's "terms" are five in number, denominated "A," "B," "C," "D" and "E." "A" is rather simple, "B" has two subdivisions, "C" has three subdivisions, "D" has seven subdivisions, "E" has two subdivisions. The reading of these "terms" leaves layman and lawyer alike bewildered and perplexed. It is difficult to simplify this language so as to make common sense of it.

For example, it is alleged in term "A" that defendants, as part of the conspiracy, acquired "other stores." There is nothing in the indictment stating what stores were so acquired, where they were located, or the date of acquisition. If Kroger had only acquired a few stores, it might be possible to defend against a charge that the acquisition of stores was part of a conspiracy to restrain trade. But the indictment, in paragraph 10, sets out that Kroger, in forty-nine transactions over a period not from 1917, but from 1904 to 1939, acquired 2,317 stores. The indictment does not allege that a single one of these acquisitions was part of the alleged conspiracy, nor does it allege that all of these store acquisitions were part of an alleged conspiracy. Therefore, defendants must come to trial wholly unprepared on term "A." They cannot be expected to come to trial with all the documents and all the witnesses to defend themselves as to each of 2,317 stores acquired during a *thirty-five year period of time.* Many of the men who negotiated these acquisitions are dead. The papers and documents are not in existence.

This so-called "term" is a mere conclusion and like the others, was drawn to confound and confuse the defendants in their defense.

Obviously, if it is alleged that the acquisition of *all* stores was a part of the conspiracy, that fact should be alleged. If only a *part* of these acquisitions is the subject of complaint, then the indictment should specify which transactions are covered. The Grand Jury must have known. There is no excuse for not naming any transaction.

Term "B" is that defendants "selected *local areas* in which to injure *competitors*, by selling lower than *elsewhere*" and combining with other big chains. No local areas are described. The commodities sold lower are not identified. The place where sold is unnamed. The competitor injured is not named. Nor are the defendants advised with what unnamed chain and during what unnamed time within the period of the last twenty-five years they are alleged to have combined. How can a criminal charge be more vague and general and more calculated to conceal from the defendants what specific charge they must prepare to meet when brought to the bar of the court for trial? Since Kroger has thirty-one hundred local stores scattered in nineteen states, the local areas referred to may relate to any one of the thirty-one hundred local areas in which it does business. Kroger sells thousands of different commodities. It has literally hundreds of thousands of small and large competitors. Many economic factors must be taken into consideration in fixing prices. Of necessity, prices vary greatly in different store locations. No one would expect oranges to sell in Kansas at the same price at which they are sold near California or Florida. When the indictment charges defendants with selling unnamed articles in unnamed areas lower than "elsewhere," at sometime during the last twenty-five years, we are hopelessly confused, instead of being "informed" of the nature of the accusation.

Term "C" simply alleges it was among the "terms" that defendants prevent competition in *selected* areas *throughout* the United States by combining with independent grocers, of whom there are hundreds of thousands, local and national chains and manufacturers of food and food products, of which there are approximately 25,000, and *others* to fix and maintain resale prices in one or more of these selected areas and "by making agreements, dividing and apportioning trade territory in *such* areas."

Term "D" of paragraph 20 alleges that it was one of the "terms" that defendants obtain buying preferences over unnamed competitors by controlling the terms and conditions upon which unidentified manufacturers, processors, packers and *other* suppliers of food and food products sell to the defendants and to other competitors, and that this was to be accomplished by various devious methods described in broad generalities.

Term "E" is a vicious generality. It alleges some false comparisons of "prices" with "competitors," "short changing" and "short weighing" some place, somewhere. What "prices"? What "competitors"? What "sales"? When? Where? In view of the millions of sales, thousands of items in thousands of stores, over a quarter of a century, how could a defendant ever prepare to defend himself against such charges without definite information as to when, where or with whom such transactions took place?

The above analysis covers the only paragraphs of the indictment which purport to describe the charge, and Paragraphs 19, 20 and 21 will be searched in vain for any information with respect to any definite time, place or circumstance which will enable defendants to prepare their defense or to which they can intelligently plead.

The indictment at bar is unique. To charge defendants, in the words of the statute, with restraint of "food and

food products," is no different than to charge General Motors with restraint of trade in "machinery products" without stating whether the charge refers to automobiles, frigidaires, diesel engines or any one of the many articles of machinery which it manufactures. It is similar to an indictment against Armour or American Tobacco Company charging a restraint of "farm products" without further particulars. Words like "machinery," "minerals," "farm products," or "food and food products" are like "trade and commerce," so all inclusive as to be uninformative. Acquiescence by the courts in the use of such generalities would establish a dangerous precedent. Such indictments do not satisfy the constitution, do not descend to particulars but enable the prosecution to conceal from the defendants, until the last minute of the trial, the definite and specific acts with which they are charged.

THE FUNDAMENTAL ERROR OF THE MAJORITY OPINION

As we read the opinions below the court was *unanimous* in concluding that the indictments of Kroger and Safeway were defective in *omitting* to state any time, place or circumstance or any act or combination with respect to any identifiable subject and that defendants could not prepare to defend themselves against such general charges *without further information.* However, the judges differed as to the *remedy* for such defective indictment. The majority held that the omission of any particulars in the indictment returned by the grand jury could be "*remedied*" by "*a bill of particulars,*" and that the information omitted by the grand jury might be furnished by the district attorney and thereby save the indictment. The minority and the district judge held that the constitutional requirements of the Sixth Amendment were among the funda-

mental bulwarks of life and liberty in the United States and could not be made dependent upon the *discretion* of either the district judge in acting on a motion for further particulars or the district attorney in supplying particulars. Individual defendants who face possible jail sentences should not be denied an opportunity to defend themselves and their liberty, and should not be made dependent on discretionary bills of particulars furnished by district attorneys. Where human liberty is placed in jeopardy by *grand jury indictment* they are entitled to know what the *grand jury* found—not what the prosecuting attorney chooses to tell them. The dissenting judges were of the opinion that the remedy for the failure of an indictment to meet constitutional requirements was a motion to quash or a demurrer which would safeguard the civil rights of the accused and enable a proper indictment to be returned.

Thus, the issue was between three judges (Bratton, Murrah and Huxman) who held that the *remedy* was to *ask* for a bill of particulars, and three judges (Phillips, Vaught and Hopkins) who held that a *constitutionally defective* indictment should be quashed.

We submit that the majority erred and that the error resulted from a misconception and a misapplication of the language of this court in *Glasser* v. *United States,* 315 U. S. 60. The majority failed to keep in mind the distinction between a "conspiracy" under Section 37 of the Criminal Code (U. S. C., Title 18, Sec. 88) and the different kind of conspiracy contemplated in the Sherman Act and hence misapplied decisions in Section 37 cases as being interchangeably applicable to anti-trust cases.

Section 37 forbids a conspiracy to commit "an offense against the United States." The mere *formation* of the conspiracy does not constitute the crime because, by the language of the Act, a necessary element is that one of the conspirators "*do*" an "*act to effect the object of the*

conspiracy." Unless an "act to effect the object," called the "overt act," is committed there is no punishable crime under Section 37.

The conspiracy contemplated in the Sherman Act is entirely different. It aims not "at an offense against the United States" but specifically relates to a conspiracy in restraint of interstate trade. An anti-trust conspiracy is a completed crime when the contract or combination is formed or entered into without regard to whether or not an overt act is committed. Hence, an overt act is essential to a conspiracy under Section 37 but is not essential under the Sherman Act except to establish jurisdiction when venue is laid at a point remote from the jurisdiction in which the conspiracy was formulated.

Under Section 37 it is necessary that the primary crime, to-wit, the conspiracy, be entered into, and *secondarily,* that there be an overt act, sometimes referred to as the *ways and means* by which the conspiracy is carried out. It has uniformly been held in Section 37 cases that the *primary crime, to-wit, the conspiracy,* must be set forth with reasonable particularity as to time, place and circumstance but that the ways and means by which the conspiracy was carried out may be amplified by a bill of particulars. The omissions in the indictment of Kroger do not concern "ways and means." In the Kroger indictment there is a complete absence of any particulars as to the time, place and circumstances of the conspiracy—which is the crime.

The confusion of the majority is evident from the opening sentence of the original opinion of Judge Bratton, which states:

> "These are two criminal prosecutions for combining and conspiring to *commit offenses against the United States* in violation of Sections 1 and 2 of the Sherman Act."

The same thought is subsequently repeated. The majority based their decision on *Glasser* v. *United States*, 315 U. S. 60, which was a *conspiracy indictment under Sec. 37*. Because of the *Glasser* opinion Judge Bratton erroneously said that it was necessary to overrule the prior decisions of the Tenth Circuit Court of Appeals in the *Skelley* * and *White* * cases as being out of harmony with the *Glasser* case. The *Glasser* case is similar to the *Williamson*,* *Thornton* * and *Wong Tai* * cases. In all the above cases the secondary or objective act was "to commit an offense against the United States." This offense in the *Glasser* case was to "*defraud the United States.*" This court said in the *Glasser* case at page 66:

> "The indictment is sufficiently definite to inform petitioners of the charges against them. It shows "certainty, to a common intent." *Williamson* v. *United States*, 207 U. S. 425, 447. The particularity of time, place, circumstances, causes, etc., *in stating the manner and means* of effecting the *object of a conspiracy*, for which petitioners contend, *is not essential to an indictment.*"

The above quotation was interpreted by the majority as requiring the court to *overrule* the decisions of that court in the *Skelley* and *White* cases and render a decision in the case at bar in conflict with a number of decisions in other circuit courts of appeal. We submit that this court did not intend to say in the *Glasser* case that the constitutional requirement of "time, place and circumstance" in an indictment charging a conspiracy is no longer necessary. *No such revolutionary proposition was before this Court for decision.* Examination of the *Glasser* indictment shows that the first count charged a definite *place, to-wit, Chicago,* at a *definite time, to-wit, March 15, 1935.* Glasser, an

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* *Skelley* v. *United States*, 37 Fed. (2d) 503; *White* v. *United States*, 67 Fed. (2d) 71; *Williamson* v. *United States*, 207 U. S. 425; *Thornton* v. *United States*, 271 U. S. 414; *Wong Tai* v. *United States*, 273 U. S. 77.

assistant United States district attorney, conspired with *definitely named persons,* to-wit, Kretske, Kaplan, Roth and Horton, to defraud the United States out of the honest services of its prosecuting officials. The "manner and means" of accomplishing the conspiracy is set forth in some detail in paragraphs 15 to 39 which names *fifty overt acts.* Glasser's contention was that "this part" of the indictment was too vague and it was with reference to "this part" of the indictment that this Court spoke in discussing the extent to which vagueness could be clarified by a bill of particulars.

It would indeed be revolutionary if this Court should uphold the erroneous opinion below and say now that time, place and circumstance are no longer essential in an anti-trust indictment. Such a holding would not only overrule a long line of anti-trust cases but also a long line of settled authorities in the courts of appeals holding that failure to particularize as to time, place and circumstance of the conspiracy which is the primary crime, *cannot be remedied by a bill of particulars.* For example, in *Jarl* v. *United States,* 19 Fed. (2d) 891, it was contended that indefiniteness should have been cured by a motion for a bill of particulars. The court said (p. 894):

> "It cannot be used to cure an indictment fatally defective. Furthermore, we do not know on what reason, or by what authority a District Attorney can assume to specify the particular offense the grand jury intends to charge, nor do we believe that any statement he might make in that respect would be binding as of record on a plea of former jeopardy. He has no power of control or right to change the action of that body."

The courts of appeals' decisions with which the present decision is in conflict, include *Fontana* v. *U. S.,* 262 Fed. 283; *Lynch* v. *U. S.,* 10 Fed. (2d) 947; *Corcoran* v. *U. S.,* 19 Fed. (2d) 901; *Partson* v. *U. S.,* 20 Fed. (2d) 127; *Turk* v. *U. S.,*

20 Fed. (2d) 129; *White* v. *U. S.*, 67 Fed. (2d) 71; *Foster* v. *U. S.*, 253 Fed. Rep. 481; *U. S.* v. *Tubbs*, 94 Fed. 356.

In *Floren* v. *U. S.*, 186 Fed. 961 (C. C. A. 8), Judge Sanborn said at page 964:

> "Where an indictment is so fatally defective in its statement of the facts alleged to constitute the offense charged that a conviction or acquittal upon it constitutes no defense to another prosecution for the same offense, a bill of particulars cannot cure it."

In *United States* v. *Norris*, 281 U. S. 619, the facts were stipulated. This Court said:

> "If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found." (p. 622)

See also *Ex parte Bain*, 121 U. S. 1; *United States* v. *Comyns*, 248 U. S. 345; *Dunlop* v. *United States*, 165 U. S. 486.

United States v. New York Great Atlantic & Pacific Tea Co., 137 Fed. (2d) 459, Distinguished

The government in the court below relied heavily upon the denial by this Court of certiorari in the above case* and the majority cite the same as an important authority. We are admonished that the denial of certiorari by this Court is not to be taken as any expression of an opinion on the merits of the case or on questions of law which may or may not have been brought forward or considered. Aside from this fact, examination of the indictment against the N. Y. Great Atlantic & Pacific Tea Company indicates that the indictment in that case was not as devoid of any specification of time, place and circumstance as the Kroger and Safeway indictments, but contained certain definite allegations.

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* Certiorari denied 320 U. S. 783.

In Part 5, 23 C(10) of the A. & P. indictment it is charged that the defendants cornered the "principal supply of *coffee available* for importation into the United States during said *six months' period* and artificially increasing the prices of coffee in the United States."

In Part 5, 23 C(11)(c) of the A. & P. indictment meat and canned goods are specifically mentioned. In Paragraph 23A(2) of the A. & P. indictment the time of the alleged agreement is specified as being "during such price wars."

In laying venue and jurisdiction the A. & P. indictment specifically charges that *meat* was sold in *Dallas* below cost and below the price charged for the *same meat* in other locations for the purpose of destroying the competition of *independent meat dealers.*

The above examples taken from the indictment in the *A. & P.* case show that, while said indictment was far from a model of clarity and definiteness, it did contain specific and definite allegations with reference to time, place and subject matter in contrast to the indictments in the *Kroger* and *Safeway* cases which do not contain a single date, do not name one article of food, do not describe a single area and do not name one competitor or collaborator.

There Is No Justification for Returning the Indictment in Kansas

Venue in Kansas is based upon the fiction of "constructive" presence in a district where it is not claimed that any one of the individual defendants has ever set foot. The constitutional right to be tried only "in the state and district wherein the crime shall have been committed" loses all of its value unless its protection is afforded before the trial is held. We do not question the rule laid down

by this court,* that after conviction in a trial where it is proved that definite overt acts were committed within the district in carrying out a conspiracy, defendants could not challenge the venue of the crime in that district. However, where objection is made *before* trial the indictment must be examined to ascertain whether any *acts pursuant to the conspiracy* are set forth with reasonable particularity as to time, place and circumstance to justify trying defendants in a jurisdiction far remote from their residence. When we examine the allegations with reference to venue we find that the climax in generalities has been reached. We are merely told, without specification, that the conspiracy was carried out "in part" in Kansas and that defendants performed in Kansas "many" of the acts set forth in Paragraph 20. When we turn to Paragraph 20 we find it sets forth substantial "terms"—not acts. Which acts, of the unnamed and unknown "many," is not remotely suggested. The only statement is that defendants *advertised* "food and food products in Kansas City, Kansas, and elsewhere in the State of Kansas, below cost and below the price charged by them for *similar* products in *other* locations." It should be noted that *advertising* as alleged is not even one of the "substantial terms" of the conspiracy set forth in Paragraph 20. Thus the defendants are left completely in the dark as to the time, place and circumstance of any act in Kansas because no act pursuant to the conspiracy charged is alleged. Further we would expect meat for instance to be not only advertised but sold cheaper in Kansas City than New York or "elsewhere" and it is frequently necessary to advertise articles below cost to move them from the shelves.

We do not claim that the defendants have a constitutional right to be tried at their place of residence. We do

* *Hyde* v. *United States*, 225 U. S. 347; *Brown* v. *United States*, 225 U. S. 392; *United States* v. *Trenton Potteries Co.*, 273 U. S. 372; *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150.

contend that if required to go to trial in Kansas upon *this* indictment their constitutional right to be tried in the district "where the crime shall have been committed" would be grossly abused and defendants will be subjected to an oppressive application of the rule which in certain cases permits basing venue upon overt acts in a foreign jurisdiction.

In *Hyde* v. *United States*, 225 U. S. 347, Justice McKenna foresaw the danger which lurks in vague and general pleadings and said:

> "We realize the strength of the apprehension that to extend the jurisdiction of conspiracy by overt acts may give to the Government a power which may be abused and we do not wish to put out of view such possibility." (p. 363)

Here jurisdiction is extended in a conspiracy case without even alleging one "overt act"!

A greater abuse than that which was foreseen has now occurred and we conclude our discussion by quoting the forceful language of Mr. Justice Holmes in his dissenting opinion in the *Hyde* case. He said at page 386:

> "Obviously the use of this fiction or form of words must not be pushed to such a point in the administration of the national law as to transgress the requirement of the Constitution that the trial of crimes shall be held in the State and district where the crimes shall have been committed. Art. 3, Sec. 2, cl. 3, Amendments, art. 6. With the country extending from ocean to ocean, this requirement is even more important now than it was a hundred years ago, and must be enforced in letter and spirit if we are to make impossible hardships amounting to grievous wrongs. In the case of conspiracy the danger is conspicuously brought out. Every overt act done in aid of it of course is attributed to the conspirators, and if that means that the conspiracy is present as such wherever any overt

act is done, it might be at the choice of the Government to prosecute in any one of twenty states in none of which the conspirators had been. And as wherever two or more have united for the commission of a crime there is a conspiracy, the opening to oppression thus made is very wide indeed. It is even wider if success should be held not to merge the conspiracy in the crime intended and achieved. I think it unnecessary to dwell on oppressions that I believe have been practised or on the constitutional history impressively adduced by Mr. Worthington to show that this is one of the wrongs that our forefathers meant to prevent."

CONCLUSION

We respectfully submit that this Court should pass on the serious questions herein presented. These questions transcend private interest. They concern every individual and the stockholders of every company with an extended business life. If the indictment in the *Kroger* case be sustained then a way has been opened to prosecute individuals and companies engaged in business by charging them with a conspiracy in general language, covering every act of their business lives for more than a quarter of a century, without further specification, and trying them at the farthest possible point from their residence and the headquarters of their business, without any further particulars than the trial Judge in the District selected by the government may in his discretion ask the district attorney to furnish. Such procedure does not even pay feeble lip service to the provisions of our constitution which were intended to guarantee that the accused be fully and fairly informed of the time, place and circumstance of the crime charged so that he may have a full and fair opportunity to defend himself and which were also intended to guarantee that he would be tried where the crime was actually committed and not "constructively" at some jurisdiction far re-

moved from his residence, headquarters and place of business. As Judge Phillips said, these questions are not technical—not theoretical—they are intensely practical. They concern the liberty of individuals—as well as the property of corporate stockholders.

We believe they merit the consideration of the Court.

Respectfully submitted,

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